**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**NICO ASPHALT PAVING, INC./ AND ITS SUCCESSOR IN INTEREST AND ALTER EGO, CITYWIDE PAVING, INC.**
***Respondents***

**And** **Case 29-CA-186692**

**UNITED PLANT & PRODUCTION WORKERS, CC LOCAL UNION 175, IAM**
***Charging Party***

**And**

**HIGHWAY, ROAD AND STREET CONSTRUCTION LABORERS LOCAL 1010, LIUNA, AFL-CIO**
***Party in Interest***

# COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Francisco Guzmán
Counsel for the General Counsel
National Labor Relations Board,
Region 29
Two MetroTech Center, Suite 5100
Brooklyn, NY 11201-3838
Telephone: (718) 765-6198
E-mail: francisco.guzman@nlrb.gov

## Table of Contents

## Table of Authorities

### Cases

**Statutes**

## I. STATEMENT OF THE CASE

### A. **Summary**

United Plant & Production Workers, Local 175 ("Local 175") is the longstanding certified representative of Respondent Nico Asphalt Paving Inc.'s ("Nico') asphalt paving employees. From November 15, 2007 to February 12, 2016, Nico recognized and bargained with Local 175 and the parties maintained a series of collective bargaining agreements providing for wages and benefits of Nico's asphalt paving employees. This productive relationship came to an abrupt and unlawful end in 2016 after Nico secretly formed CityWide Paving, Inc. ("CityWide") as its alter ego, moved all of the bargaining unit's work to CityWide, without first giving Local 175 notice and an opportunity to bargain, and repudiated the collective bargaining agreement.

In mid-to-late 2015, one of Nico's main customers, Consolidated Edison Company of New York ("Con Edison") informed Nico that it would begin enforcing a provision in its service contract requiring Nico to use only workers from labor unions that were signatory to a collective-bargaining agreement with the General Contractors Association of New York ("GCA"), an employer association. Con Edison informed Nico that it had to comply with the terms of their service contract, particularly the requirement that Nico's employees be represented by a union that was a member of the Building & Construction Trades Council of Greater New York

("BCTC")[1]. Local 175 is not a member of the GCA. At all material times, Local 175 maintained a bargaining relationship with the New York Independent Contractors Alliance ("NYICA") rather than the GCA.

Thereafter, the President of Nico informed Roland Bedwell, Business Manager of Local 175, that Nico might have to move some of its unit work to another company. The Local 175 Business Manager objected immediately telling Nico that it could not move the bargaining unit's work to another company. [Tr. 523].

As a result of Con Edison's request, in December 2015, Michael Pietranico Sr. ("Senior"), President of Nico, created CityWide Paving Inc., which, as demonstrated below, is a disguised continuance of Nico. Senior's only reason for creating CityWide was to avoid Nico's obligation to honor the Local 175 collective bargaining agreement.

In order to effectuate this unlawful scheme, on January 18, 2016, Senior's daughter, Danamarie Pietranico, ("Danamarie") signed a Section 8(f) agreement on behalf of CityWide with Highway, Road and Street Construction Laborers Local 1010, LIUNA, AFL-CIO ("Local 1010"). Local 1010 is a member of the BCTC. Thereafter, on February 12, 2016, Con Edison issued CityWide a notice to proceed with asphalt paving work in Manhattan, New York. That same day, Senior and his son Michael Pietranico Jr. ("Junior"), who served as a superintendent for both Nico and then CityWide, called a meeting of Nico's Unit employees and announced that it

[1] On several occasions the Building & Construction Trades Council of Greater New York was referred to as the "BTC". The proper short name is BCTC as per GC Exh. 16(c), at 20.

was their last day of work. Junior explained that Nico could no longer perform asphalt paving work for Con Edison with employees represented by Local 175 because Con Edison now required Nico to have a contract with Local 1010, a member of the BCTC.

On February 17, 2016 Local 175 filed an initial charge against Nico in Case No. 29-CA-169943 alleging that Nico and CityWide were alter egos who had violated Section 8(a)(l), (2), (3), and (5) by discharging its employees; that the alter ego had been forced to sign a contract with Local 1010 to retain the Con Edison work; and that the employees could only continue to perform the work if they became members of Local 1010. That charge was dismissed by the Regional Director based, in part, as discussed below, on Nico's concealment of material facts relating to the closing of its operations.

In the meantime, Nico forged ahead with its plan to move the Unit's work to alter ego Citywide. On February 22, 2016, Nico entered into a General Service Agreement with CityWide, subcontracting out all of Nico's asphalt paving work. The General Service Agreement is signed by Senior as President of Nico and Danamarie as the President of CityWide. The Service Agreement states that CityWide will perform all of Nico's asphalt paving work in New York City. However, Nico did not really go out of business or stop performing asphalt paving work. After signing the subcontracting agreement with CityWide, Nico continued receiving asphalt paving work from Welsbach Electric Corp. ("Welsbach"), Verizon Sourcing, LLC ("Verizon"), and other customers. Although it is clear that this

asphalt paving work is also bargaining unit work under Nico's collective bargaining agreement with Local 175's, Nico nevertheless subcontracted that work to CityWide. Nico did not inform Local 175 that it was still receiving this Unit work or that it subcontracted out bargaining unit work and purposefully concealing its conduct from Local 175 until October 2016 when it was forced to respond to a subpoena from the NLRB connected to another Complaint.

After moving Nico's work to CityWide, CityWide hired employees who were previously employed by Nico to perform the same asphalt paving work that they had performed as Nico employees. A comparison of Nico's payroll records from the end of 2015 and CityWide's payroll records from the beginning of 2016 demonstrates that at all material times, a majority of CityWide's bargaining unit employees were former Nico employees in the Local 175 bargaining unit.

On March 23, 2016, CityWide signed an agreement with Local 1010 recognizing it as the Section 9(a) representative of its asphalt paving employees. Under the Local 1010 contract, employees performing unit work earned less per hour in combined wages and fringe benefits than they had previously earned under the Local 175 contract.

On April 26, 2016, Local 175 filed a second unfair labor practice charge against Nico in Case 29-CA-174926. The charge alleged that Nico had violated Section 8(a)(5) by failing and refusing to bargain with Local 175 over employee layoffs and its decision to stop operating the business.

On May 19, 2016, Local 175 sent an information request to Nico and CityWide seeking, among other things, information about the relationship between the two companies. The companies responded the same day challenging Local 175's statutory authority to request the information; Respondents provided only limited information to Local 175 on July 1, 2017.

On May 25, 2016, the Region determined that there was insufficient evidence to support the allegations in Case 29-CA-169943, the original charge that alleged the two companies were alter egos, and Local 175 withdrew the entire charge the next day. On that same day, Local 175 amended the charge in Case 29-CA-174926 to include a Section 8(a)(3) allegation that Nico discriminated against its employees by laying them off because they were Local 175 members.

On July 27, 2016, the Region issued a Complaint and Notice of Hearing in Case 29-CA-174926 alleging that Nico violated Section 8(a)(5) by failing to provide Local 175 with notice and opportunity to bargain over the effects of closing its business. The Complaint did not allege that Nico had an obligation to bargain over the decision itself, because Nico had claimed its business was closed and that CityWide was only performing work for Con Edison.

By letter dated August 17, 2016, Local 175 requested that CityWide bargain over the wages, hours, and working conditions of its asphalt paving employees now working for CityWide. CityWide's attorney responded by asking whether Local 175 could satisfy Con Edison's requirement that it be a member organization of the

BCTC and also advising that CityWide would only respond to Local 175's bargaining demand if Local 175 could satisfy Con Edison's requirement.

On October 6, 2016, prior to the start of the Hearing in Case 29-CA-174926, the parties reached a settlement. During the settlement discussions, Nico informed Local 175 for the first time that Nico had contracts to perform asphalt paving work with Verizon and Welsbach that it was still performing through CityWide.[2] This was the first time Local 175 learned that Nico continued to perform Unit work for customers other than Con Edison. On October 6, 2016, as required by the settlement, Local 175 requested that CityWide bargain over the effects of Nico's closing.

The preponderance of the evidence presented at the Hearing overwhelmingly shows that Respondent committed each violation alleged in the Complaint. Therefore, General Counsel asks that Your Honor issue a decision and recommended order finding Respondent in violation of the Act. These violations warrant as full and significant a remedy as Board law permits.

B. **Procedural History**

Local 175 filed the instant charge against Respondents in Case No. 29-CA-186692 on October 20, 2016. The General Counsel by the Regional Director of Region 29 ("Regional Director") issued a Complaint and Notice of Hearing on September 29, 2017, alleging violations of Section 8(a)(1), (2), (5) and 8(d) of the Act. [GC Exh. 1(c)]. Respondents filed a joint Answer on October 9, 2017 [GC Exh. 1(e)]

[2] This information was provided pursuant to the hearing subpoena.

and later filed an Amended Answer[3] on October 12, 2017. [GC Exh. 1(f)]. Respondents' Amended Answer admitted jurisdiction, service, charging party's labor organization status, but denied all the substantive allegations of the Complaint. Respondents also asserted several affirmative defenses. [GC Exh. 1(f)].[4]

The Hearing in this matter took place before Administrative Law Judge Jeffrey P. Gardner ("Administrative Law Judge" or "Your Honor") on December 11, 12, 13, and 14, 2017.

On December 11, 2017, while on the record, Counsel for the General Counsel's motion to amend the Complaint to correct the name of the Charging Party Union to read "Construction Counsel 175, Utility Workers Union of America, AFL-CIO" was granted. On December 14, 2017, Counsel for the General Counsel's motion to amend the Complaint to amend the name of the Charging Party as "Construction Council Local 175, UWUA, AFL-CIO," to reflect the Charging Party's change in affiliation, and to alleged that Respondent had violated Section 8(a)(5) by also subcontracting Unit work to "other contractors" in addition to those already named in the Complaint was granted.[GC Exh. 1(n), Tr. 45].

---

[3] The only difference between the original Answer and Amended Answer is that in the Amended Answer the word "sufficient" is substituted by the word "insufficient" under the Respondents first affirmative defense.

[4] In its answer and amended answer, Respondents raises several affirmative defenses: that the Complaint, in its entirety, alleges facts insufficient to constitute a valid cause of action; that the Local 175 collective bargaining agreement is invalid; that by reason of Charging Party's conduct, unclean hands estop any right of relief; "that the Charging Party herein for each and every course of action included in the Complaint are barred by reason of acts, omissions, representations and courses of conduct by Charging Party by which these Respondents were led to rely on to their detriment thereby barring such course of action under the Doctrine of Equitable Estoppel.", [GC Exh. 1(f)]; that the Charging Party is not a labor organization under Section 2(5) of the Act; and finally, that the charge is time barred under Section 10(b) of the Act.

On December 14, 2017, while on the record, Respondents also moved to amend its Answer to deny Local 175's status as a labor organization.[Tr. 451].

## II. STATEMENT OF THE FACTS[5]

### A. Background

#### *1. Nico's Business, Managerial Structure and Customers*

Nico operated as an asphalt paving and milling contractor in the construction industry in and around New York City between about 1996, when owner Michael Pietranico, Sr. ("Senior") incorporated the business, and 2016 [Tr. 74, GC Exh.18]. At all relevant times, Nico had four officials, including Senior as its President; John Denegall ("Denegall") as its Vice President since August 6, 1999; Michael Pietranico Jr. ("Junior") who served as a manager or superintendent; and Danamarie Pietranico ("Danamarie") (Senior's daughter) who held various titles including Vice President, Secretary-Treasurer, and Booker [Tr. 65, 66, 70-72, 371, 375, GC Exh. 36].

Nico operated its business out of 341 Nassau Avenue in Brooklyn, New York [GC Exh. 1]. The property at 341 Nassau Avenue is owned by Rosal Realty, a company solely-owned by Senior. [Tr. 180].

Nico also owned a fleet of at least seventeen (17) trucks and vehicles valued at approximately $2,312,782.99 [Tr. 360, GC Exh. 35]. The trucks are currently

---

[5] All factual citation are from the official hearing record. Citations to the Transcript will appear as "Tr.___" followed by the particular pages(c) cited in the transcript. Citations to Exhibits will be denoted as "GC Exh.__:","Resp. Exh.__" or "CP Exh.__."

maintained at 341 Nassau Avenue. Some of the trucks are owned personally by Senior, but it is unclear from the record which ones. [Tr. 267].

Nico had contracts with several companies to provide asphalt paving services. Nico had a large contract for asphalt paving services with Con Edison for many years prior to this litigation [Tr. 66]. On September 15, 2015, Nico entered into a contract with Welsbach, an electric company, to perform asphalt paving work from September 15, 2015 to August 30, 2017. [Tr. 112, GC Exh. 11].

In 2013, Nico also entered into a multi-year contract with Verizon to do "outside plant asphalt paving services". [GC Exh. 10, at 3]. The Verizon contract was effective from January 1, 2013 to December 2016 and was later extended until December 31, 2017. [GC Exh. 10, Tr.106].

In addition to those contracts, during the terms of the collective bargaining agreement with Local 175, Nico also provided asphalt paving services for other contractors, including "ED Electric", "Hellman", "Safeway", "Denella", "West Moreland", "Triumph", "Network Infrastructure", and the New York City Department of Transportation (DOT) [Tr. 415, 416].

Nico purchased the asphalt that it used for its business from Willets Point Asphalt Corp. [Tr. 153, GC Exh. 17].

### *2. Nico's Longstanding Collective Bargaining Relationship with Local 175*

Between the early 2000's and 2016, Nico and Local 175 signed and maintained several successive collective bargaining agreements wherein Local 175

would provide and represent the employees who performed Nico's asphalt paving work.

In or around May 2000, Senior submitted an application for Nico to join the New York Independent Contractors Association ("NYICA"). At the time, Nico had a collective bargaining agreement with Local 1018[6], which was succeeded by Local 175 as the bargaining representative of the paving employees. In or about 2004 Senior joined the Board of NYICA [Tr. 235, GC Exh.4]].

On June 14, 2005, Nico voluntarily recognized Local 175 as the "exclusive collective bargaining representative of all employees working in the classification covered by the Local Union 1018 Agreement" which included all asphalt paving employees. [GC Exh. 5].

Soon after, on July 1, 2005, Nico and Local 175 signed a paving division assumption agreement binding Nico to the terms of the agreement between Local 175 and NYICA, and recognizing Local 175 as the majority 9(a) representative of the unit employees. [GC Exh. 6].

Two weeks later, Nico and Local 175 executed another agreement whereby Nico agreed to be bound by "all agreements, declarations of trust, amendments and regulations of the United Plant and Production Worker Local 175 Pension, Welfare, Annuity, Skill Improvement and Training Fund." [GC Exh. 7].

On January 18, 2007, the Board held an election to determine whether Nico's asphalt paving employees wanted Local 175 or Local 1018 to represent them. Local

---

[6] Local 1018 was an affiliated union to Local 1010, not a party to this case. [Tr. 43-50]. The contract between Nico and Local 1018 covered all asphalt paving employees.

175 won that election and the Board certified Local 175 as the representatives of Nico's paving employees on November 15, 2007. [GC Exhs. 25, 26].

As an employer member of the NYICA Board, Senior participated in contract negotiations with Local 175 every three years along with other contractor representatives. [Tr. 235, 241]. Senior participated in negotiating the 2011-2014 NYICA contract [GC Exh. 8, Tr.243]. He also participated in negotiations of the 2014-2017 NYICA contract [GC Exh. 9, Tr.245]. That contract became effective July 14, 2014, and was to remain in effect through June 30, 2017 [GC Exh. 9].

Between 2014 and Nico's unlawful conduct alleged in this case, Nico gave effect to the 2014-2017 contract by paying wages and benefits according to the 2014-2017 contract. [Tr. 100, 102]. During the Hearing for this matter, when asked by the Administrative Law Judge whether there was anything in the 2014-2017 contract that the Nico did not honor, John Denegall answered "Nope. Honored it the whole time." [Tr. 102, ln 5].

In December 2015, Nico's dues and benefit remittance statements show that at the time, Nico employed 30 Unit employees who were all covered by Local 175's paving division collective bargaining agreement.[7]

### B. **Relevant Subcontracting Provisions of the 2014-2017 CBA**

The most recent collective bargaining agreement between the parties contains specific language about subcontracting that is relevant to this case. Article X of the 2014- 2017 agreement binds subcontractors to the terms of the agreement.

---

[7] Michael Pietranico is listed as one of the Unit employee.

In Article X, entitled "Intent of Agreement," Section 2 addresses "Binding Subcontractors and Other Firms," and states in pertinent part:

> (a) The terms, covenants and conditions of this Agreement shall be binding upon all Subcontractors at the site to whom the Employer may have sublet all or part of a contract entered into by the Employer. The Employer shall guarantee payments on behalf of its subcontractor(s) for wages and contributions set forth in this Agreement.
>
> ***
>
> (d) The Employer stipulates that any firm engaging in Site and Grounds Improvements, Utility, Paving and Road Building Work in which it has or acquires a financial interest, shall be bound by all of the terms and conditions of this Agreement.

### C. **Con Edison Makes Changes to its Standard Terms Contract**

In early 2015, Nico began having conversations with Con Edison, its biggest customer, about a new requirement in its standard terms and conditions contract. During a meeting with Con Edison to discuss the renewal of its asphalt paving contract a representative of Con Edison told Senior that Con Edison would not give the work to Nico unless Nico had another collective bargaining agreement with a union in the BCTC. Senior relayed that information to Vice President Denegall. [Tr. 144].

Sometime later still in early 2015, after speaking with Con Edison, Denegall contacted Roland Bedwell, Business Agent of Local 175 by cell phone and informed him of Con Edison's new requirement. Bedwell replied that he would look into it [either disputing Con Edison's change or exploring if Local 175 could meet that requirement] and get back to Denegall. Bedwell asked Denegall whether Nico was

changing anything at that time. Importantly, Denegall assured Bedwell that Nico would not be changing anything that would affect unit employees as a result of Con Edison's requirement because the parties had a contract in force [Tr. 519]. On or about August 2015, after another meeting with Con Edison, Denegall and Senior called Bedwell by cellphone. Senior told Bedwell that Con Edison had once again raised the issue of the BCTC agreement. Bedwell replied, "We'll look into it and get back to you." At that point in August 2015, neither Denegall nor Senior had made a decision to move forward with creating a new company.[ Tr. 519].

On or about October 2015, Con Edison initially announced that it was awarding a construction contract to Nico by issuing a purchase order with an expenditure limit of $32,750,000 [GC Exh. 16 (a), Tr. 279]. Sometime after[8], Senior met with a representative from Con Edison and was informed again that Con Edison would *not* award the bid to Nico unless Nico had a contract with a BCTC union. [Tr. 280-81, 520].

Between October 2015 and November 2015, Denegall contacted Bedwell again and told him that Con Edison raised the requirement of Nico having a union contract with a BCTC union in order to obtain the work. Bedwell asked Denegall "where this pressure was actually coming from and [where] that rule came from that gave Con Edison the right to enforce [the provision]?" [Tr. 520: 15]. At that point, there was still no agreement or concrete plan between Senior and Denegall to

[8] The record is unclear as to when Nico was told that it would not be awarded the Con Edison bid. But it can be inferred that it was between October 2015 and November 2015 when Senior decided to create CityWide. [Tr. 521].

create a new company, nor was there an agreement with Con Edison either as to how to proceed. [Tr. 521]. In November 2015 Nico continued using Local 175 members for its asphalt paving work. [Id.]

In November 2015, Senior and Denegall decided – without informing the Union - to create a new company [Tr. 524]. In December 2015, Denegall asked Bedwell whether Local 175 would be able to join the BCTC. Bedwell said that he had no success in joining the BCTC. [Tr. 522].

### D. In November 2015, Senior Secretly Establishes An Alter Ego Called CityWide Paving Inc.

In November 2015, after Con Edison advised Senior that Nico would not be awarded the Con Edison work, he and Denegall decided to create a new company in order to be able to obtain the Con Edison asphalt work. [Tr. 521]. In December 2015, Senior filed an application to incorporate and create CityWide. [GC Exh. 19, Tr. 159-160, 262, 384]. Senior was named as the only elected director of the corporation. [Tr. 176, GC Exh. 19].

Shortly after filing the paperwork to create CityWide, on November 30, 2015, Senior sent a letter to NYICA, requesting to resign from the NYICA board as of December 2, 2015. [Resp. Ex. 4]. That request was made after Senior had participated in negotiating of the 2014-2017 agreement and while that agreement was still in effect. [Tr. 102, GC Exh. 9].

### E. **The Union Objects to Nico's Establishment of CityWide**

About two months after establishing CityWide, around the second week of February 2016, Denegall and Senior finally told Union representative Bedwell of the existence of CityWide. In contrast to Denegall's assurances in November 2015, Senior revealed that he had to protect his company and his family by starting CityWide, and that he would transfer the Nico employees to CityWide so they could keep their jobs with Con Edison's work that had been done under the Nico name. [Tr. 522-523]. This was the first time that Senior told Bedwell that Nico was starting a new company [Tr. 524].

Bedwell objected to Nico creating a new company to transfer Nico's bargaining unit work to, stating that he would go consult with officials of Local 175 to see how to handle the situation.[Tr. 523]. During the short period of time after this conversation in mid-February, Nico continued to employee Unit employees and applied the terms of the Local 175 contract.[Tr 523]. On February 22, 2016, Respondent discharged those Unit employees; on that day, Junior gathered employees in the yard and announced to them that they could no longer work for Nico. [Tr. 523].

### F. **CityWide Unlawfully Signs A Collective Bargaining Agreement With Local 1010 When It Is Obligated To Honor Its Collective Bargaining Agreement With Local 175**

Soon after its creation, but before hiring any employees, CityWide signed a collective bargain agreement with Highway, Road and Street Construction Laborers Local 1010, LIUNA, AFL-CIO ("Local 1010").

On January 18, 2016, Danamarie signed a collective bargaining agreement with Local 1010 pursuant to Section 8(f) on behalf of CityWide. [GC Exh. 13]. Present at the signing of the agreement were Keith Loscalzo, Business Manager for Pavers and Road Builders on behalf of Local 1010, Danamarie Pietranico, and John Denegall. At the time, Denegall was not an employee of CityWide, but was still employed as the Vice President of Nico. [Tr. 395, 296].

### G. CityWide Signs Agreement with Con Edison

On February 12, 2016, at the same time that CityWide was finalizing the paperwork it needed to begin its operations and begin working on Con Edison projects, Con Edison issued CityWide a notice to proceed with work in Manhattan. The notice to proceed was directed to and signed by Senior as President of CityWide. [GC Exh. 16(a)].

### H. Nico Stops Operating Without First Notifying the Union and Giving it an Opportunity to Bargain and Repudiates the Collective Bargaining Agreement

Once CityWide received its notice to proceed from Con Edison, Nico wasted no time in stopping its operations - without having provided Local 175 with any notice or an opportunity to bargain over it decision to stop its business operations.

On the morning of February 12, 2016, Junior called a meeting with all the employees of Nico at 341 Nassau Avenue. Present at the meeting were Junior, Senior, Bedwell and all the Nico employees. Junior told the employees that they could no longer work for Nico if they belong to Local 175 [Tr. 286]. It is undisputed

that Junior further stated that if employees wanted to continue working "here" they would have to join Local 1010. [ Tr. 286].

The record evidence establishes that was the first time that Nico announced that it would close its operations, and the first time it told the Union. There are no other records establishing any earlier communications between Nico and Local 175, Nico never sent any letters or notices to the Union or the employees announcing Nico's closure prior to this day. [Tr. 22, 25]

### I. Nico Unlawfully Subcontracts Unit Work without Notifying Local 175

On February 22, 2016, Nico entered into a General Service Agreement with CityWide pursuant to which Nico subcontracted all of its asphalt paving work in the five boroughs of New York City [Tr.115, GC Exh. 12][9]. Neither Senior nor Denegall ever informed Bedwell or Local 175 that Nico intended to sign an agreement with CityWide assigning it all of the Unit's work to CityWide. [Tr. 525]. Respondent admitted at the Hearing that Local 175 never agreed Respondents' transferring the Local 175 employees or work to CityWide. [Tr. 525].

The General Service Agreement is signed by Senior as president of Nico and Danamarie as the president of CityWide. The Service Agreement states that CityWide will provide Nico with asphalt paving services in New York City. Nico admits that it did not give Local 175 any notice of its decision to subcontract Unit work. [Tr. 117, 516].

---

[9] At the Hearing Danamarie testified: "…Whatever work that Nico had, existing contracts for work from other companies that we do on a weekly basis, I was able at CityWide to take over." [Tr. 391, lns 11-13]

No one else was present when the service agreement was signed except Senior, Danamarie and John Denegall. [Tr. 388-89]. With this agreement, CityWide took over all the work that Nico had [Tr.390]. The record further establishes that the agreement between Nico and CityWide was not reached at arm's length. Danamarie admitted at the Hearing that CityWide did not compensate Nico to obtain all of Nico's work. [Tr. 391].

As part of the contract between the two entities, CityWide also performed Nico's work for other customers including Verizon, Welsbach, ED Electric, Hellman, Safeway, Denella, West Moreland, Triumph, Network Infrastructure, New York City Department of Transportation (DOT) [Tr. 415-16].

CityWide also performed Unit work in May 2016 for another construction company called "Tri-Messine," work that was also Nico bargaining unit work. Denegall admitted that neither Nico nor CityWide gave any notice to Local 175 about Nico's decision to subcontract the Tri-Messine work to CityWide, although Nico claimed to have ceased operations. [Tr. 516-17].

### J. CityWide Starts Performing Unit Work as an Alter Ego and Successor Employer to Nico

#### *1. CityWide's Business, Managerial Structure and Customers are Nearly Identical to Nico's*

CityWide's business, managerial structure and customers are virtually identical to Nico's. CityWide began operating in late February 2016 performing the same asphalt paving and milling work as Nico in and around New York City. [Tr. 75]. CityWide's business address was initially the same 341 Nassau Avenue address

as Nico's address. Although CityWide later moved across the street to 330 Nassau Avenue [Tr. 60, 180], both properties located at 341 and 330 Nassau Avenue are owned by Rosal Realty, a company owned solely by Senior. [Tr. 180]. CityWide does not pay any rent to Senior for the use of his property [Tr.180, 262].

Senior receives a payment of $20,000 a month from CityWide, but admitted that this payment is not for the rental of his trucks, but rather just a gratuitous payment from daughter to father [Tr. 190, 259-60,360]. Senior, despite not having an official title or work with CityWide, spends three to four days per week at 330 Nassau Avenue "hanging out" [Tr. 265-66 ln: 23-25]. He also signed several documents and contracts on behalf of CityWide; Senior signed a bond on behalf of CityWide for $32,750,000 on February 8, 2016 [Tr.352, GC Exh. 34]; Senior signed a notice to proceed for Con Edison on February 15, 2016. [GC Exh. 16(a)].

The evidence also shows that CityWide has the same officers, managers and other personnel as Nico did. Dana Pietranico, formerly the Vice President of Nico, immediately became the President and Secretary-Treasurer of CityWide [Tr. 71]. John Denegall, formerly the Vice President of Nico, immediately became the Vice President of CityWide. [Tr. 65, 66]. As Vice President of CityWide, Denegall's role was to oversee the day-to-day operations and contracts - exactly the same role and duties as Vice President of Nico. [Tr. 61-62]. Denegall uses the same office space, desk and computer as he did when he was Vice President of Nico.[ Tr 73]. Junior was the Superintendent at Nico and is now a Superintendent with CityWide. [Tr.

70, 370]. CityWide also employs Nico's administrative assistant, Chantel James. [Tr .281, GC Exh. 31].

Additionally, not only are CityWide's managers and personnel the same as Nico's, but CityWide uses the same trucks to perform the same asphalt paving work as Nico. [Tr. 81]. CityWide rents trucks from Nico Equipment Co., another company owned exclusively by Senior. CityWide is Nico Equipment Co.'s only client [Tr. 266, 267]. The Respondents did not produce any evidence demonstrating how much – if anything at all - CityWide pays Nico or Nico Equipment Co. for using the trucks, despite those records being requested by the General Counsel prior to the Hearing. [GC Exh. 2(a), para. 11].

CityWide uses Nico's account and credit line to buy asphalt from Willets Point Asphalt Corp., the same asphalt supplier used by Nico. [Tr.179, 506, GC Exh. 17].

Additionally there are several other important similarities between Nico and CityWide. Nico and CityWide use the same bonding company, phone number, attorney and accountant as Nico. [Tr. 6, 73, 183, 185, 211, 429].

***2. CityWide's Workforce***

A majority of its employees were previously employed by Nico in the bargaining Unit represented by Local 175.

According to the payroll records provided by Nico and CityWide for the pay period ending February 28, 2016, which is the first pay period that CityWide paid employees to do paving work (and at which time CityWide had a representative

complement of employees), 14 of its 26 (54%) employees were formerly Nico bargaining unit employees represented by Local 175. [GC Exh. 27, 28].

Thereafter, in each successive week of operation, CityWide continued to hire even more of the Nico bargaining unit employees For the pay period ending March 6, 2016, 15 of its 28 (54%) paving employees were formerly Nico bargaining unit employees [GC Exh. 27, 28].

For the pay period ending March 13, 2016, 19 of its 33 (58%) paving employees were formerly Nico bargaining unit employees [GC Exh. 27, 28]. In the following week, for the pay period ending March 20, 2016, 19 of its 32 (59%) paving employees were Nico bargaining unit employees. [GC Exh. 27, 28].

### K. CityWide Unlawfully Recognizes Local 1010 as the 9(a) Representative of its Asphalt Paving Employees

On March 23, 2016, CityWide signed a second agreement with Local 1010, this time recognizing it as the Section 9(a) representatives of its employees [GC Exh. 15]. Under the Local 1010 contract, employees performing unit work earned about 5.5% less per hour in combined wages and fringe benefits. [GC Exh. 9, 13, 15]. [Tr.152]. Under the Local 175 contract, unit employees earned $82.81 per hour in wages and fringe benefits. Under the Local 1010 contract, unit employees earn $ 78.25 per hour in wages and fringe benefits. [GC Exh. 9, 13, 15]. The undisputed evidence establishes that CityWide never gave effect to the Local 175 contract.[Tr. 152].

### L. **Local 175 Files Several ULP Charges against Nico and CityWide**

After Local 175 first learned that Nico intended to perform asphalt paving work for Con Edison under a disguised company, Local 175 filed unfair labor practice charges against Nico and CityWide, seeking to enforce its statutory rights and putting Nico and CityWide on notice of the allegations.

On February 17, 2016, Local 175 filed an unfair labor practice charge with the NLRB against Nico in Case 29-CA-169943. The charge alleged that Nico and CityWide were alter egos who had violated Section 8(a)(1),(2), (3) and (5) of the Act by informing Local 175 members that Nico would no longer employ them because Con Edison required the alter egos to employ members of Local 1010 to perform work for it, that the alter ego had been forced to sign a contract with Local 1010 to retain the Con Edison work, and that they could only continue to perform work if they became members of Local 1010. [GC Exh. 1(o), GC Exh. 1(p)].

As set forth more specifically below, Nico did not disclose its true relationship with CityWide during the pendency of several unfair labor practice investigations. Rather, the facts demonstrate that Nico misled the Region and the Union about the relationship between Nico and CityWide, and by claiming that Nico was no longer operating.

For example, on March 24, 2016, the Region issued a request for evidence letter to Nico's attorney. On page 2, item 3 of that letter, the Board agent asked: "Does the Employer have any relationship or other business connection with

CityWide Paving Co.? If so, what is that relationship or other business connection? When did that relationship begin?" [GC Exh. 38(a),(b)].

On April 4, 2016, Nico, by letter from its attorney, responded simply "Nico and CityWide are separate corporate entities." [GC Exh. 38(a),(b)]. This response came well after Nico had given all of its work to CityWide by signing a general service agreement for all the Unit work. As such, Respondent knowingly misrepresented the fact that there was a significant contractual relationship and connection between Nico and CityWide.

Union Attorney Eric Chaikin also testified without rebuttal from the Respondents that up until October 2016, Nico represented to Local 175 that it was out of business. [Tr. 436].

On April 26, 2016, Local 175 filed a second charge against Nico in Case 29-CA-174926. The charge alleged that Nico violated Section 8(a)(5) by failing and refusing to bargain with Local 175 over employee layoffs and its decision to stop operating the business.[GC Exh. 3].

### M. **Local 175 Requested Information From and Bargaining With Nico and CityWide**

On May 19, 2016, Local 175 sent an information request to Nico, seeking among other things, information about the relationship between Nico and CityWide. Nico's attorney responded the same day asking Local 175 what statutory authority it had for making the request. Local 175's attorney responded again via email stating that Nico had a duty to bargain with Local 175 and that it wanted information to determine whether CityWide was an alter ego of Nico. Nico's

attorney responded via letter months later on July 1, 2016, only after the investigation on the NLRB charges had progressed, still refusing to provide any information related to CityWide and only answering for Nico. [GC Exh. 23(a), (b)].

### N. Local 175 Withdraws Its Initial Charge and Amends the Second ULP Charge

On May 26, 2016, Local 175 withdrew the entire charge in Case 29-CA-169943. On that same day, Local 175 amended the charge in Case 29-CA-174926 to include a Section 8(a)(3) allegation that Nico had discriminated against its employees since February 2016 by laying them off of non-Con Edison projects because they were Local 175 members. [GC Exh. 39, 3].

### O. On July 27, 2017, The Regional Director Of Region 29 of The NLRB Issued a Complaint Against Nico

Between May 26, 2016 and July 2016, the Region investigated the amended allegations. On July 27, 2016, the Region issued a Complaint and Notice of Hearing in Case 29-CA-174926 alleging that Nico violated Section 8(a)(5) by failing to provide Local 175 with notice and an opportunity to bargain over its February 2016 decision to lay off bargaining unit employees, under the theory that Nico was no longer operating.

### P. CityWide Refuses to Bargain With Local 175 Concerning Unit Work

By letter dated August 17, 2016, Local 175 requested that CityWide bargain over the wages, hours, and working conditions of its asphalt paving employees. By letter dated August 23, 2016, CityWide's attorney refused, asking whether Local

175 could satisfy Con Edison's requirement that it be a member organization of the BCTC. The attorney said CityWide would only respond to Local 175's bargaining demand if Local 175 could need Con Edison's requirement. [GC Exh. 24(a),(b),(c)].

### Q. **Parties Reach a Settlement in Case 29-CA-174926**

On October 6, 2016, prior to the start of the Hearing for Case 29-CA-174926, the parties reached a settlement of that case. During settlement discussions, Respondent provided Nico's Verizon and Welsbach contracts to the Union and to the Board, pursuant to a Hearing subpoena that was issued in Case 29-CA-174926. By producing these documents, Respondent thereby revealed to the Union - for the first time - that Nico was still in business by servicing the Verizon and Welsbach contracts through CityWide. [Tr. 436]. Prior to that conversation, Nico had always falsely maintained to the Union and to the Region 29 that it was out of business. [Tr. 436, GC Exh. 3].

### R. **Local 175 Files the Instant Case**

On October 20, 2016, just several days after discovering that Nico was still operating and servicing contracts, Local 175 filed the charge in the current case. [GC Exh. 1 (a)].

### S. **Local 175 Changes Affiliation**

Local 175 changed affiliation shortly before the Hearing. On November 2, 2017, Local 175[10] signed an affiliation agreement with Utility Workers Union of America, AFL -CIO [GC Exh. 21]. Prior to signing that agreement and, at least between 2011 and 2017, Local 175 dealt with employers, such as Nico, concerning labor disputes, wages, rates of pay and conditions of work, evident by Local 175's participation in negotiation of the NYICA agreements in 2011 and 2014. [Tr. 240, GC Exh. 8, 9, 14. 20(a), 20(b), 22, 26, 36].

### T. **During the Hearing Respondents Failed to Produce Subpoenaed Documents**

Counsel for the General Counsel issued subpoenas *duces tecum* to both Nico and CityWide. [GC Exh. 2(a), 2(b)]. Respondents did not file a petition to quash either of the subpoenas. [Tr. 29].

Throughout the four days of hearing, the ALJ reminded Respondent of its obligation to comply with the subpoena and produce all of the documents requested therein. Respondent Nico failed to provide documents responsive to the following paragraphs of the subpoena in GC Exh. 2 (a):

> 24. Bank statements, checks, records of deposits and withdrawals and all other documents connected with all financial accounts and instruments of deposit controlled by Respondent at any time during the period covered by this subpoena.
>
> 28. Correspondence, contracts, agreements, bills of sale, bills of lading, invoices, purchase orders, receipts and all other documents showing the

[10] It is clear from the record that between the filing of the Charge and November 2, 2017, Local 175 had changed its affiliation, as made evident from the name used for the Union in the Affiliation Agreement, GC 21.

receipt of goods, materials or services by Respondent during the period covered by this subpoena.

29. Such documents as will show all quotes and bids for work projects submitted by Respondent or any of its officers, directors or agents to any person or entity at any time during the period covered by this subpoena, including documents showing responses and any resulting contracts or agreements.

30. Such documents as will show the purchase, rental, or acquisition of all supplies, furniture, equipment, facility, vehicle, or other asset used by the Respondent in the operation of its business at any time during the period covered by this subpoena.

Respondent CityWide also failed to provide documents responsive to the following paragraphs of the subpoena in GC Exh. 2 (b):

11. Documents showing or describing all transfers, assignments, leases, gifts, exchanges, agreements, including business contracts, entered into between Respondent and Nico Asphalt Paving Inc.

12. Documents showing or describing all transfers, assignments, leases, gifts, exchanges, agreements, including business contracts, entered into between Respondent and Nico Equipment Corp.

15. Documents reflecting the ownership of the Respondent during the period covered by this subpoena, including documents reflecting the full legal name of each person or entity who held an ownership interest at any time during the period covered by this subpoena, documents reflecting the percentage ownership of each owner and any changes to such respective ownership shares, and documents reflecting the dollar value of such ownership and any changes thereto during the period covered by this subpoena.

[Tr. 455-464]

## III. ARGUMENT

The credible, probative record evidence irrefutably establishes that Respondents engaged in the unlawful conduct alleged in the Complaint. In this regard, the evidence shows that CityWide is an alter ego of Nico bound to the contract between Nico and Local 175 and that CityWide violated Section 8(a)(5) by failing to apply the terms of that contract to its asphalt paving employees. Second, Nico's decision to subcontract or assign its Verizon, Welsbach and other work to CityWide, which involved merely rehiring the same employees to do the exact same work under similar employment conditions, concerned mandatory subjects of bargaining. Thus, Nico's unilateral subcontracting constituted an unlawful mid-term modification that violated Section 8(a)(5) and (d), and a unilateral change that violated Section 8(a)(5). Third, in the alternative, CityWide violated Section 8(a)(5) by refusing to recognize and bargain with Local 175 as a *Burns* successor because it continued the employing enterprise and at all relevant times, a majority of its workforce was composed of former Nico employees who had been represented by Local 175. Fourth, CityWide violated Section 8(a)(2) by recognizing and entering into a contract with Local 1010 at a time when, as Nico's alter ego, it remained in a bargaining relationship with Local 175 and bound to the Nico-Local 175 contract.

As demonstrated more fully below, Respondents' defenses are not supported by the record evidence. Moreover, the record reflects that General Counsel's witnesses are wholly credible while Respondent's witnesses proved to be incredible and provided completely self-serving and inaccurate testimony.

### A. **Credibility Determinations: General Counsel's Witnesses Should Be Credited Over Respondents' Witnesses**

In order to evaluate the relevant facts and to determine what weight to give witnesses' testimony, certain credibility resolutions must be made. During this proceeding, Counsel for the General Counsel called as witnesses under 611(c) of the Federal Rules of Evidence three of Respondents' officers: Denegall, Senior and Danamarie. Counsel for the General Counsel also presented testimony from Gus Seminatore, Local 175's President and Local 175 Attorney Eric Chaikin. Respondents only called one witness, Denegall, despite having obvious control over its other officers including Senior and Danamarie.

#### *1. General Counsel's Witnesses Testified Credibly*

The record evidence clearly demonstrates that Seminatore and Chaikin testified in a credible, consistent and forthright manner and that their testimony should be believed. Seminatore gave detailed accounts of a conversation he witnessed and was honest in his description of the events he testified to. In particular, Seminatore testified credibly that between February 12, 2016 and on the following days, there was no violence outside Nico's facility. Local 175 Attorney Chaikin testified without contradictions and in a clear and forthright manner.

Specifically, Attorney Chaikin testified without rebuttal from Respondents that up until October 2016, Nico represented to Local 175 that it was out of business. [Tr. 436]. Because there is no contradicting testimony from Respondents,

the Administrative Law Judge should credit Chaikin's unrefuted testimony that Nico falsely told Local 175 that it was no longer in business.

### *2. Respondent's Witnesses Testimony was generally vague, implausible, inconsistent, and contradicted by the documentary evidence*

In stark contrast to General Counsel's witnesses, Respondents' Officers' testimony was vague. Respondents' questioning of the witnesses was scant, and their witness's testimony was self-serving, lacked sufficient detail, was unsupported by documentary evidence and showed a propensity to lie. Given Respondents' witnesses' undeniable attempts to mislead Your Honor with their vague, implausible, inconsistent, and unsupported responses, where there is a factual dispute, General Counsel's witnesses must be credited and Respondents' witnesses must be discredited.

### *3. John Denegall gave self-serving testimony that was inconsistent, and contradicted by documentary evidence and other witness testimony*

John Denegall testified on several days of the hearing. His testimony over several days was inconsistent and was contradicted by documentary evidence and other witness testimony.

Denegall initially testified that he held no other position with CityWide other than Office Manager and Superintendent. [Tr. 60] However, when presented with his board affidavit, he later contradicted his initial testimony, now admitting that he was an officer of CityWide serving as its Vice President [Tr. 65].

Denegall testified that Nico Equipment, Inc. did not purchase trucks from Nico Asphalt. He also stated that Nico Equipment, Inc. does not own or otherwise have possession of any trucks that were previously owned by Nico Asphalt Paving [Tr. 79, 80, 360, 361]. That testimony was wholly contradicted by Senior, who testified that he purchased the trucks from Nico Asphalt and "put them into Nico Equipment." [Tr. 269]

Denegall also testified untruthfully claiming that there was a break in service between the time when Nico stopped operating and when CityWide began operating. [Tr. 82]. Denegall also testified that Nico had stopped operations in the third week of January 2016. [Tr. 124] These statements are demonstrably false. The payroll records show that Nico's last payroll period ended February 21, 2016, [GC Exh. 27], CityWide's first payroll period end date was the very next week February 28, 2018, during which employees were paid for 16 to 52 hours of work that week. Thus, the payrolls records establish that there was no break in time between Nico's alleged closing and the start of CityWide's operations. [GC Exh. 28(a)]. The documentary evidence also establishes that Denegall continued to collect his regular $1,600.00 weekly paycheck from Nico through February 21, 2016. [GC Exh. 27]. Denegall later testified that Nico went out of business completely by March 30, 2016. [Tr. 502], but CP Exh. 3, an invoice from Nico to Tri-Messine Contracting Corp., demonstrate that Nico was still billing companies for work on May 10, 2016. [CP Exh.3].

Denegall also testified untruthfully about his relationship with Local 1010. He stated that he only met Business Manager for Pavers and Road Builders of Local 1010, Keith Loscalzo once,[Tr. 199] but Denegall was present twice when Keith Loscalzo and Dana signed two documents, the Local 1010 CBA, [GC Exh. 13], and the separate appendix to that document [GC Exh. 15], which have different dates. His memory was clearly faulty and unreliable.

When initially questioned by the General Counsel, Denegall stated that the NYS Corporation Registration form for CityWide, [GC Exh. 19] was filed by Senior [Tr. 160]. However, when later questioned by Respondents' counsel about the document, he changed his testimony, this time stating that Danamarie filed it instead. [Tr. 161]. Denegall's testimony was therefore inconsistent, contradicted by documentary evidence and other witness testimony and should be discredited.

#### *4. Michael Pietranico Sr. gave testimony that lacked detail, was contradicted by record evidence and showed a propensity to lie*

Senior was called to testify by the General Counsel. Respondents then asked Senior a very limited questions. Although Respondents had the opportunity to recall Senior after the General Counsel rested its case, they chose not to. Senior's testimony lacked detail, was contradicted by documentary evidence and most importantly demonstrated a propensity to lie about the relationship between Nico and CityWide, his role in CityWide's formation and his involvement in CityWide's day to day operations in order to cover up Respondent's unlawful conducted.

Specifically, when asked about his duties as president of Nico, Senior stated that he was in the field most of the time setting routes and setting the men up. [Tr. 225]. That is an over simplified and undetailed explanation of his job as president of asphalt paving company. Also, Senior was unable to recall the name of the Union he employed members from since at least 2007, Local 175 United Plant & Production Workers. Additionally, when asked what happened to Nico in 2015, Senior also lied on the stand. Initially Senior testified that he did not recall going to any NYICA negotiation meetings in 2014. [Tr. 237]. After being presented with copies of the sign-in sheets with his signature on it, he changed his answer and admitted to going to those meetings. [Tr. 238, GC Exh. 20(a), (b)].

Senior testified that he signed certain documents on behalf of CityWide only because he did not want his daughter [Danamarie] signing documents at the office due to some alleged violence outside. [Tr. 249]. But when questioned by opposing counsel and the Administrative Law Judge about that alleged violence, Senior was unable to give a specific description of any actual violence at the workplace. [Tr.249, 256].

Senior also stated that he signed the Con Edison notice to proceed for CityWide on February 15, 2016, because he did not want his daughter coming to the yard, presumably because of what he described as "violent" activity. [GC Exh. 16(a)] But he also signed the bond on behalf of CityWide on February 8, 2016, [GC Exh. 34], and there is no evidence of any labor issues or violence on that day either. [Tr. 357-358]. Rather, there is only some evidence of picketing and that picketing did not

start until at least February 15, 2016, [Tr. 299]. Senior's propensity to lie is further demonstrated by evidence initially presented by Respondents' own witnesses during the course of the underlying investigation. Specifically, Denegall testified in his May 12, 2016 affidavit that the labor dispute occurred on February 29, 2016, not on February 15, or February 8, 2016. [Tr. 494] In the meantime, General Counsel's witness Gus Seminatore credibly testified that there was never any violence at Respondents' facility. [Tr. 299] therefore contradicting Senior's testimony.

Senior also signed, and John Denegall notarized, a notice that states that Senior was the President of CityWide. [GC Exh. 34, at 3] although he denied that he had any position with CityWide, further exposing how Senior's testimony was constantly contradicted by the records evidence.

Senior also testified that he only owned five (5) trucks but the documents show that Nico Asphalt owned more than five trucks [Tr. 360, GC Exh. 35].

Therefore because Senior gave testimony that lacked detail, was contradicted by record evidence and showed a propensity to lie, the Administrative Law Judge should discredit Senior testimony that he did not own and operate CityWide, in the same way that he owned and operated Nico.

### *5. Danamarie Pietranico gave self-serving testimony that was contradicted by record evidence and showed a propensity to lie*

Similarly, Nico's Vice President and CityWide President, Danamarie's testimony was totally implausible, contradicted by documentary evidence and

showed her propensity to lie in order to bolsters Respondent's untruthful claim that Nico and CityWide were separate entities.

Danamarie's testimony that she was the President of CityWide and responsible for its day-to-day operations was completely implausible. For example, she could not recall when she allegedly had a conversation with her father about signing an enormous contract for $32,750,000 with Con Edison [Tr. 386]. She also did not recall whether CityWide provided a bid to Con Edison, arguably its biggest client. [Tr. 427]. As noted above, Senior also holds himself out and acts as CityWide's President, negotiating contracts with Con Edison, signing agreements and bonding CityWide after its formation. The astounding discrepancy in their remuneration also bolsters the conclusion that Senior, not Danamarie runs CityWide. Senior admitted to receiving $20,000 a month from CityWide, yet Danamarie is paid the same amount as another administrative employee, $1,000 per week, and continues receiving the same amount of weekly pay that she received while working as the bookkeeper at Nico. [Tr .281, GC Exh. 31, 33].

Danamarie also lied about other less significant but important facts. For example, she testified untruthfully that as president of CityWide, she never had an office at 341 Nassau [Tr. 372], yet that address appears consistently across many CityWide documents [GC Exh. 12, GC Exh. 16(a), GC Exh. 19]. Danamarie initially claimed that CityWide does not use credit lines from Nico Asphalt. [Tr. 407] but the records show that they do use Nico's credit to purchase asphalt. [Tr. 179]. She then changed her answer after being confronted by General Counsel. [Tr. 407].

Based on the above, the Administrative Law Judge should discredit Danamarie's testimony that she owns and was the President of CityWide.

### B. Respondents Failure to Produce Subpoenaed Documents Warrants Evidentiary Sanctions

Where a party refuses or fails to timely or properly comply with a subpoena, the Administrative Law Judge has discretion to apply several sanctions. *McAllister Towing & Transportation*, 341 NLRB 394 (2004), including drawing an adverse inference against the non-complying party. See, e.g., *Essex Valley Visiting Nurses Assn.*, 352 NLRB 427, 441–444 (2008), reaffd. 356 NLRB 146 (2010), enfd. 455 Fed. Appx. 5 (D.C. Cir. 2012) (respondent's failure to produce subpoenaed documents warranted an adverse inference supporting the General Counsel's allegation of single-employer status). Here, the General Counsel timely served subpoenas to both Respondents [GC 2(a),(b)]. Respondent Nico failed to produce the information requested in paragraphs 24, 28, 29, and 30 of the subpoena. Respondent CityWide failed to produce the information requested in paragraphs 11, 12, and 15 of the subpoena. Therefore, the Administrative Law Judge should draw the following adverse inferences.

#### *1. Adverse inferences should be drawn against Nico*

Since Nico failed to provide bank statements, checks, records of deposits and withdrawals and all other documents connected with all financial accounts and instruments of deposit controlled by Respondent at any time during the period covered by this subpoena, as requested in paragraph 24 of the subpoena in the record as GC Exh 2(a), the Administrative Law Judge should draw an adverse

inference that had those documents been produced they would show a strong financial connection between Nico and CityWide, further supporting a finding that they are alter egos. Respondent's explanation that the documents no longer exist is unbelievable and should not be accepted. [Tr. 458].

Additionally, since Nico failed to produce correspondence, contracts, agreements, bills of sale, bills of lading, invoices, purchase orders, receipts and all other documents showing the receipt of goods, materials or services by Nico during the period covered by this subpoena, as requested in paragraph 28 of the subpoena, the Administrative Law Judge should draw the adverse inference that such documents would show that Nico purchased goods for CityWide and that CityWide made no payments to Nico for the purchase of those goods, further establishing an alter ego relationship.

Similarly, since Nico failed to produce such documents as will show the purchase, rental, or acquisition of all supplies, furniture, equipment, facility, vehicle, or other asset used by Respondents in the operation of its business at any time during the period covered by this subpoena, as requested in paragraph 30 of the subpoena, the Administrative Law Judge should draw the adverse inference that such documents would show that Nico purchased rented, or acquired supplies, furniture and equipment for CityWide and that CityWide made no payments to Nico for the purchase of those goods, further establishing an alter ego relationship.

### *2. Adverse inferences should be drawn against CityWide*

CityWide failed to produce documents showing or describing all transfers, assignments, leases, gifts, exchanges, agreements, including business contracts, entered into between CityWide and Nico Asphalt Paving Inc., as requested in paragraph 11 of the subpoena issued to it. Also, Denegall stated that CityWide paid Nico for the Asphalt but failed to produce any subpoenaed documents that would have substantiated that claim. [Tr. 165]. The Administrative Law Judge should draw the adverse inference that such documents would show that Nico and CityWide did not have any arms-lengths transactions as its agents attempted to testify to on the record, again, establishing an alter ego relationship between the two companies.

Furthermore, CityWide did not provide records of assignments, leases, gifts, exchanges, agreements, including business contracts, entered into between Respondent and Nico Equipment Corp., as requested in paragraph 12 of the subpoena. Although Denegall testified that CityWide pays Nico Equipment for the use of the trucks, Respondents did not produce any subpoenaed documents that would support this claim. [Tr. 84]. As such, the Administrative Law Judge should draw the adverse inference that such documents would show that CityWide did not actually pay Nico Equipment Corp for the use of Senior's trucks.

Finally, CityWide failed to produce any documents reflecting the ownership of CityWide during the period covered by this subpoena, including documents reflecting the full legal name of each person or entity who held an ownership

interest at any time during the period covered by this subpoena, documents reflecting the percentage ownership of each owner and any changes to such respective ownership shares, and documents reflecting the dollar value of such ownership and any changes thereto during the period covered by this subpoena, as requested in paragraph 15 of the subpoena. Accordingly, the Administrative Law Judge should draw the adverse inference that such documents would show that Senior actually owns CityWide, not Danamarie.

It would be wholly appropriate for the Administrative Law Judge to draw the above adverse inferences due to the Respondents failure to produce the subpoenaed documents and their failure to provide a satisfactory explanation. *Hansen Bros. Enterprises*, 313 NLRB 599 (1993); *Champ Corp*., 291 NLRB 803 (1988).

### C. Nico and CityWide are Alter Egos, and CityWide Violated Section 8(a)(5) By Not Applying the Nico-Local 175 Contract to its Paving Employees

In determining whether two employers constitute alter egos for purposes of the Act, the main question to be answered is "whether the two employers are the same business in the same market." *In Re Sobeck Corp. & Roof Pro, Inc.,* 321 NLRB 259, 266 (1996) (quoting *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 151 (3d Cir. 1994)). The Board answers that question affirmatively when the two entities have "substantially identical" ownership, management, supervision, business purpose, operations, equipment, and customers. *See, e.g.*, *Advance Electric*, 268 NLRB 1001, 1002 (1984), *enforced,* 748 F.2d 1001 (5th Cir. 1984); *Fugazy Continental Corp.*, 265 NLRB 1301, 1301-02 (1982), *enforced,* 725 F.2d 1416 (D.C. Cir. 1984). Whether the

alter ego was created to evade responsibilities under the Act is another factor that supports an alter ego finding. *Fugazy Continental Corp.*, 265 NLRB at 1302. Not all of these factors, however, must be present to establish an employer's alter ego status and none of them, alone, is determinative of the issue. *See, e.g.*, *El Vocero de Puerto Rico*, 357 NLRB 1585, 1585 n.3, 21 (2011) ("no single factor is determinative and the Board does not require the presence of each factor to conclude that alter ego status should be applied"); *Fugazy Continental Corp.*, 265 NLRB at 1302 (stating that no one factor "is the *sine qua non* of alter ego status").

At the same time, the Board will find an alter ego relationship in the absence of substantially identical common ownership only "where both companies were either wholly owned by members of the same family or nearly entirely owned by the same individual, or where the older company maintained substantial control over the new company." *See El Vocero De Puerto Rico*, 357 NLRB at 1585, n.3. The Board has explained that "ownership by members of the same family does not compel a finding of substantially identical ownership, because it does not inherently indicate common control." *Midwest Precision Heating & Cooling*, 341 NLRB 435, 435 (2004), *enforced*, 408 F.3d 450 (8th Cir. 2005). But where "two entities are virtually indistinguishable but for the difference in ownership of the entities by members of the same family, substantially identical ownership is established." *Id.* at 439 (quoting *Cofab, Inc.,* 322 NLRB 162, 163 (1996)).

With respect to CityWide's obligation to honor Nico's collective bargaining agreement with Local 175, the Board is clear that, "If an employer is found to be an

alter ego of another employer that has a contract with a union, the alter ego is also bound by that union contract." *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 8 (2007). An alter ego violates Section 8(a)(5) by failing to honor that contract. *See, e.g.*, *Island Architectural Woodwork*, 364 NLRB No. 73, slip op. at 6-7 (Aug. 12, 2016).

Applying the multi-factor test, the evidence conclusively establishes that Nico and CityWide are alter egos: they operate the same business in the same market and each factor of the test is satisfied here. Initially, the facts easily establish substantially identical ownership among Nico and CityWide because both companies are owned by Senior and members of his family. Senior owns Nico and although Respondents claim that Danamarie, Senior's daughter owns CityWide, the probative evidence – including Respondents inability to produce documents showing that Danamarie owns CityWide, compels the conclusion that Senior actually owns CityWide. In addition, common ownership is established because Nico maintains substantial control over CityWide.[11] In December 2015, Senior incorporated CityWide and named himself as the sole director in the articles of incorporation, thereby retaining sole control over the direction of the new business. All of Nico's officers also have management positions with CityWide, including Danamarie who represents herself as CityWide's president. Denegall manages the day-to-day

[11] *See, e.g.*, *McAllister Bros., Inc.*, 278 NLRB 601, 616-17 (1986) (finding two employers were alter egos without common ownership where the new company received all of its initial capital from the older company and its bank, the new company existed almost solely to service the older company's customers and could not expand without the older company's permission, the new company performed its work with the older company's equipment and conducted business in accordance with the older company's requirements, and the older company's customers did not know of the existence of the new company because the older company acted as if they were one entity), *enforced*, 819 F.2d 439 (4th Cir. 1987).

operations of both Nico and CityWide, and Junior holds the same position for both companies. Furthermore, but for Nico subcontracting its work to CityWide, Senior would not have had a job or any other source of income from which he derives $20,000 per month. In short, there is extensive evidence of substantially identical common ownership.

The remaining factors of the alter ego test are also satisfied. Regarding substantially identical management and supervision, as noted above, Senior, Junior, Danamarie, either have the exact same or a similar management position with CityWide. Again, Senior, Denegall and Junior are responsible for CityWide's day-to-day operations just as they were at Nico. Furthermore, under the terms of the General Service Agreement between Nico and CityWide, CityWide performed the same work for Welsbach and Verizon that Nico performed. Notably, customers Welsbach and Verizon continued to submit their work requests to Nico.

Regarding business purpose and operations, CityWide performs the same asphalt paving work for the same customers in the same area, i.e., New York City. CityWide is also located at the same business address as Nico, which is listed in its Articles of Incorporation. Senior is also listed as CityWide's contact person at that address. A majority of CityWide's workforce is comprised of former Nico employees. Moreover, CityWide is using Nico's equipment, which it leases from Nico Equipment, who purchased the equipment from Nico. Nico Equipment is owned by Senior, and it also operates out of the same business address as Nico and CityWide.

In sum, the facts overwhelmingly establish that CityWide is substantially identical to Nico on each factor of the alter ego test.

Finally, although the Board has held that intent to avoid legal obligations under the Act is not a necessary factor for establishing alter-ego status, its presence further supports such a finding. *ADF, Inc.*, 355 NLRB 81, 83 (2010), *affirmed*, 355 NLRB 351 (2010). That intent is present here. It is clear from the secretive creation of CityWide in late 2015, the signing of a general service agreement behind the Union's back and from Junior's February 12, 2016 announcement, in Senior's presence, to Nico's employees that Nico was opening CityWide to avoid its bargaining relationship with Local 175. Junior stated at that meeting that Nico had formed CityWide because it could not perform Con Edison work with Local 175-represented employees, and that it had to sign a contract with a BCTC member union, such as Local 1010. Nico/CityWide's Vice President confirmed that this was the reason Nico and CityWide had signed the General Service Agreement in late February 2016 that subcontracted Nico's work to CityWide. Finally, it is unrefuted that until the settlement discussions for Case 29-CA-174296 in October 2016, Nico did not disclose to Local 175 the fact that it continued to perform other non-Con Edison paving work (i.e., the Verizon and Welsbach work). These facts all establish that the intent behind Nico's closing and CityWide's creation was to avoid an existing bargaining obligation with Local 175.

In sum, the facts here easily establish that CityWide is the alter ego of Nico. Thus, CityWide violated Section 8(a)(5) by not recognizing and bargaining with

Local 175 as the exclusive bargaining representative of its employees, and by failing to apply the terms of the Nico-Local 175 contract to those employees. *See, e.g.*, *Island Architectural Woodwork*, 364 NLRB No. 73, slip op. at 6-7; *Fugazy Continental Corp.*, 265 NLRB at 1303.

### D. Nico Was Not Excused From its Bargaining Obligation by Con Edison's Standard Terms and Conditions

Con Edison's requirement that Nico have its employees represented by a union affiliated with the BCTC did not privilege Nico to completely disregard its bargaining obligation with Local 175. That is particularly true where Nico had ampletime to notify and bargain with Local 175 over this issue because Con Edison had provided Nico with ample advanced notice in late 2015 that it would later require compliance with the service contract. *See, e.g., RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995) (noting in the context of contract negotiations, that "[a]bsent a dire financial emergency, the Board has held that economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action"); *Coastal Intl. Security*, 362 NLRB No. 1, slip op. at 4 (Feb. 19, 2015) (in finding that employer breached informal settlement agreement, Board rejected employer's defense that it should not be required to immediately terminate employees on union's request under contract's union-security clause because that would cause it to default on its government contract; Board noted that clause gave employer sufficient time to obtain employee compliance without immediate termination and that "such a generalized defense,

without more, is not a defense to failure to comply with the explicit terms of the contract").

Therefore Con Edison's requirement that Nico comply with the terms of their service contract by having its employees represented by a union affiliated with the BCTC did not privilege Nico to disregard its bargaining obligation with Local 175.

### *1. Nico's conversations with Bedwell in late 2015 did not amount to adequate notice so as to require the Union to request bargaining at that point*

The Employer may argue that Local 175 waived its right to bargain over the "closing" of Nico and subsequent changes because Local 175 knew that Nico was contemplating transferring or subcontracting all Unit work to CityWide as early as August 2015. That claim is without support in the record and Board law, and should be rejected. Nico's initial general conversations with Bedwell about Con Edison's changes in its terms and conditions did not constitute adequate notice to the Union of Nico's ultimate decision, implemented much later, to create an alter ego, close its operations, subcontract all of the Unit's work and repudiate the collective bargaining agreement because any such plan was not formed and, at the very least, were inchoate at the time it was first mentioned to Local 175 October and November of 2015.

An employer can make unilateral changes to mandatory bargaining subjects only if the union clearly and unmistakably waives its right to negotiate over the changes. See *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983).A waiver of the right to bargain may be found where a union has notice that an employer intends to

implement changes in conditions of employment but fails to request bargaining concerning the changes. *American Buslines, Inc.*, 164 NLRB 1055, 1056 (1967). However, such a waiver will not be found in the absence of clear notice of an intended change. *Sykel Enterprises*, 324 NLRB 1123 (1997); *Burrows Paper Corp*., 332 NLRB 82 (2000); *Metropolitan Edison*, supra. An employer's announcement that it *might* institute a change in conditions of employment in the future is too "inchoate and imprecise" to obligate a union to request bargaining. *Oklahoma Fixture Co.*, 314 NLRB 958, 960-961 (1994), *enf. denied* 79 F.3d 1030 (10th Cir. 1996). *See also Pan American Grain Co., Inc*., 343 NLRB 318, 318-19 (2004). In that case, the Board found that the employer's general statements during bargaining regarding potential work force reductions were not sufficiently specific to provide the union with reasonable notice and an opportunity to bargain over its decision to implement layoffs. *See id*. (citing *Gannett Co.*, 333 NLRB 355, 357 (2001) (to be adequate, prior notice must afford a union with a reasonable opportunity to evaluate the employer's proposal properly and to present counter proposals before any implementation or change).

In the early 2015 conversations between Nico and Bedwell, Nico did not inform Bedwell that it had definite plans to or intended to change to their bargaining relationship. To the contrary, Denegall told Bedwell that Nico would not be making any changes to its business or that would affect the Unit in response to Con Edison's requirement that Nico have a labor contract with a BCTC union, because the parties had a collective bargaining agreement in effect [Tr. 519]. In

August 2015 when the parties again spoke about Con Edison's requirement that Nico have a labor contract with a BCTC union, Bedwell told either Senior or Denegall that Local 175 would look into it [consider joining BCTC] and get back to them. At that point there was still no clear notice from Nico of any intended changes in the terms and conditions of employment of the Unit employees. In October 2015, the parties spoke again about Con Edison's demand, and this time Bedwell asked, "where this pressure was actually coming from and where that rule came from that gave Con Ed the right to enforce that". [Tr. 520:15]. Here again, Nico failed to provide any notice of concrete or intended changes. In November 2015, after yet another conversation with Con Edison, Senior and Denegall decided to incorporate CityWide, without telling Local 175. This evidence firmly establishes that at that point, the decision to cease operating Nico and to subcontract out the bargaining Unit's work was already made while Local 175 was still under the impression that Nico had, at best, an "inchoate and imprecise" plan. In fact, Respondent's own witnesses, Denegall, testified that in December 2015 Local 175 was still contemplating whether it could join the BCTC. Finally, in the second week of February 2016 when Senior announced his plan to start a new company to perform asphalt paving work for Con Edison, Bedwell objected by telling Senior that he did not think that the company could do that[move bargaining unit work to a newly created company] .

Therefore, the facts clearly demonstrate that the Union was never given advanced notice of Nico's decision to create an alter ego, close its operations,

subcontract the entire Unit to its alter ego, and repudiate the collective bargaining agreement.

The facts also demonstrate that when Senior finally told Bedwell of his decision to create a new company to perform Nico's asphalt work, the Union objected. These facts conclusively demonstrate that Local 175 also did not waive its right to bargain.

### *2. Local 175 was excused from requesting bargaining because Nico had already made a decision to "Close" its business*

By the time Nico finally told Local 175 that it was going to open a new company and shut down its operations, it was too late for the Union to request meaningful bargaining. As such, Local 175 was not obligated to have requested bargaining. A union is excused from requesting bargaining where the contemplated changes are presented to it as a *fait accompli*. *Brannan Sand & Gravel Co.*, 314 NLRB 282 (1994). For example, in *Northwest Graphics, Inc.*, 342 NLRB 1288, 1288 (2004) and 343 NLRB 84 (2004), the Board found that an employer, who provided the union with last minute notice of proposed changes to employees' work schedules before implementation, violated the Act since the change was viewed as a fait accompli, and there was no evidence of an economic exigency or waiver by the union. Here, it was not until February 2016, when Nico informed Local 175 that a new company would be opened to perform bargaining unit work. However, by that time, CityWide already existed and had already signed the first 9(a) agreement with Local 1010. CityWide and Nico had also already signed the General Service Agreement subcontracting Nico's work.

The record evidence establishes that Local 175 was not obligated to engage in an exercise of futility and demand bargaining over Nico's unlawful conduct because Nico had already subcontracted the Unit's work and signed a collective bargaining agreement with Local 1010.

### E. Nico's Unilateral Subcontracting of its Verizon, Welsbach and Other Work Involved a Mandatory Subject of Bargaining and Constituted an Unlawful Mid-Term Contract Modification and Unilateral Change

It is clear from the record that Nico never actually "closed" as a business, but rather shifted its work to CityWide. Nevertheless, Nico officers continue to argue that Nico was closed. For the reasons set forth above, Nico and CityWide are alter ego and therefore any assignment of work from Nico to CityWide is just that, a shift of work. Alternatively, if it is found that CityWide and Nico are not alter egos, Nico's subcontracting of Unit work was unlawful as outlined below.

The Administrative Law Judge should find that Nico violated its statutory bargaining obligation by subcontracting the Verizon and Welsbach work without obtaining consent from or bargaining with Local 175. It is "well established that contracting out of work regularly performed by unit employees is a mandatory subject of bargaining" and that "an employer who unilaterally subcontracts unit work without first bargaining with its employees' representative about its decision, as well as the effect such contracting will have on unit employees, frustrates collective bargaining, and thereby violates Section 8(a)(5)." *Public Service Co.*, 312 NLRB 459, 460 (1993). The controlling case on this point is *Fibreboard Paper Products Corp. v. NLRB* 379 U.S. 203 (1964), where the Supreme Court held that an

employer's decision to subcontract its maintenance work in such a way that it "merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment," was a mandatory subject of bargaining. As the Court explained, since the decision to subcontract and replace existing employees with those of an independent contractor involved no capital investment and had not altered the employer's basic operation, requiring the employer to bargain about that decision "would not significantly abridge [its] freedom to manage the business." *Id.* at 213. The Court also noted that the employer's decision turned on workforce size, fringe benefits, and overtime pay, which it deemed matters "peculiarly suitable for resolution within the collective-bargaining framework." Id.

In *Torrington Industries*, the Board determined that it would apply *Fibreboard* to a subcontracting decision that involved the substitution of one group of employees for another whether or not the employer's decision was motivated by labor costs in the "strictest sense of that term[.]"307 NLRB 809, 811 (1992). The Board expressly declined to apply the *Dubuque Packing* 303 NLRB 386, 391 (1991), (*enforced sub nom. Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993)), test, which is used to determine whether a work relocation decision is a mandatory bargaining subject, to such *Fibreboard* subcontracting where "the decision clearly involved unit employees' terms of employment and it did not 'lie at the core of entrepreneurial control.'" The Board explained that if "virtually all that is changed through the subcontracting is the identity of the

employees doing the work," the decision does not involve a change in the scope and direction of the enterprise and, thus, is not a core entrepreneurial decision outside the scope of mandatory bargaining. *Id*. Therefore, in cases factually similar to *Fibreboard*, "there is no need to apply any further tests" because the Supreme Court in *Fibreboard* "already determined" that bargaining is required. *Id.* at 810; *see also Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000) (reaffirming *Torrington* framework that *Fibreboard* applies to a subcontracting decision that does not result in a change to the scope and direction of a business even if the decision was based on non-labor cost reasons), *affirmed in part and reversed in part*, 248 F.3d 1131 (3d Cir. 2000) (unpublished table decision).

The Administrative Law Judge should conclude here that the General Service Agreement between Nico and CityWide constituted *Fibreboard* subcontracting and, thus, involved a mandatory subject of bargaining. Nico did not change its basic operation but continued to provide asphalt-paving services to the same customers, i.e., Verizon and Welsbach.[12] Nico's operational changes consisted of using CityWide employees (a majority of whom had worked for Nico) to do the exact same work under the same service contracts for the same customers. Thus, Nico's decision to subcontract its asphalt paving work consisted simply of replacing unit employees with CityWide employees (who had worked for Nico). Therefore, the

[12] Nor did Nico close as its officers claimed and continued to claim during the hearing. Nico continued accepting work requests from Verizon, Welsbach and other contractors, and then used CityWide's employees to perform that work. Thus, this was not a decision about closing the business, which would not subject to bargaining under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677, 686 (1981).

decision falls within the holdings of *Fibreboard*, as interpreted by *Torrington*, because it did not involve a core entrepreneurial decision outside of the scope of mandatory bargaining. *See also O.G.S. Technologies,* 356 NLRB 642, 645 (2011) (marginal increase in subcontracting of die-cutting work did not involve a partial closing or other change in the scope and direction of the enterprise where business "remained devoted to the manufacture and sale of brass buttons to the same range of customers").

Because the subcontracting involved a mandatory subject of bargaining, Nico's unilateral implementation of that decision amounted to an unlawful mid-term modification of its contract with Local 175 in violation of Section 8(a)(5) and (d) because it did not rely in good faith on a sound arguable interpretation of the management rights or subcontracting provisions in that contract. To establish a Section 8(d) violation, the General Counsel "must show a contractual provision, and that the employer has modified the provision. *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005), *affirmed sub nom.*, *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14 (1st Cir. 2007). In such cases, the Board must determine whether the employer has altered the terms of the contract without the union's consent. *Id.*, 345 NLRB at 501. The Board will not find a Section 8(d) violation if the employer has a "sound arguable basis" for its interpretation, and the employer is not motivated by animus, acting in bad faith, or in any way seeking to undermine the union's status as collective bargaining representative. *Id*. at 501-02. In sum, "a contract

modification does not exist if there is good faith reliance on a sound and arguable interpretation of the contract." *Id.* at 502.

The Board assesses whether a party's contract interpretation has a sound arguable basis by applying traditional principles of contract interpretation. *Conoco, Inc.*, 318 NLRB 60, 62 (1995), *enf. denied*, 91 F.3d 1523 (D.C. Cir.1996). The parties' actual intent underlying the contract language in question is paramount, and is given controlling weight. To determine the parties' intent, the Board normally looks both at the contract language and any relevant extrinsic evidence, such as the parties' past practice regarding the implementation of the contract provision, or the bargaining history of the provision. *See, e.g., Mining Specialists*, 314 NLRB 268, 268-69 (1994), *enforced*, 326 F.3d 602 (4th Cir. 2003).

Here, Nico violated Article X, Section 2 of its contract with Local 175. Article X, Section 2 stated at subsection (a) that "[t]his Agreement shall be binding upon all Subcontractors at the site to whom the Employer may have sublet all or part of a contract entered into by the Employer. The Employer shall guarantee payments on behalf of its subcontractor(s) for wages and contributions set forth in this Agreement." Nico did not adhere to this contract language. It subcontracted its work to CityWide, who signed a labor contract with Local 1010 that provided less favorable wages and fringe benefits for the employees performing the unit paving work. Thus, Nico unlawfully modified its contract with Local 175 in violation of Section 8(a)(5) and (d).

Independent from and as an alternative to the mid-term modification theory of violation, Nico's subcontracting of the Verizon and Welsbach work violated Section 8(a)(5) because it constituted a unilateral change to a mandatory subject of bargaining. In contrast to Section 8(d) contract modification cases, Section 8(a)(5) unilateral change cases "do[] not require the General Counsel to show the existence of a contract provision[.]"*See Bath Iron Works Corp*., 345 NLRB at 501. Rather, the General Counsel "need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining*." *Id*. (emphasis in original). To the extent that the contract is at issue, the Board's focus in unilateral change cases is whether there is anything in the contract that privileged the Employer's conduct, *i.e*. whether the Union contractually waived its right to bargain. *Id.* at 502. The Board applies a "clear and unmistakable" waiver standard to determine whether a union has waived its right to bargain about a mandatory subject of bargaining during the term of a collective-bargaining agreement. *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-11 (2007). The Board will find a waiver if the contract either "expressly or by necessary implication" confers on management a right to unilaterally take the action in question. *See id*. at 812, n.19.

Applying these principles here, the evidence conclusively establishes that Nico violated Section 8(a)(5) by unilaterally subcontracting its Verizon, Welsbach and other contractors paving work without bargaining with Local 175. Nico did not have an established past practice of contracting out unit work. Moreover, because

the contract does not explicitly permit Nico to subcontract unit work, the contract did not contain any waiver by Local 175 of its right to bargain over the subject. Thus, by acting unilaterally, Nico violated Section 8(a)(5).

### F. CityWide Violated Section 8(a)(5) by Refusing to Recognize and Bargain with Local 175 as a Burns Successor

An employer succeeds to the collective-bargaining obligations of its predecessor if a majority of its employees, consisting of a substantial and representative complement in an appropriate bargaining unit, are former employees of the unionized predecessor, and if there is a substantial continuity between the two enterprises. *NLRB v. Burns Intl. Security Services, Inc.*, 406 U.S. at 291, 294-95; *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41-43, 52 (1987). The factors relevant to "substantial continuity" are whether a majority of the predecessor's employees maintain the same jobs, under the same working conditions, with the same supervisors, and whether the new entity has the same production process, produces the same products, and has basically the same body of customers. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 43; see also *Bronx Health Plan*, 326 NLRB 810, 811 (1998), *enforced mem.*, 203 F.3d 51 (D.C. Cir. 1999). These factors are to be assessed primarily from the perspective of the employees involved; that is, whether the "employees who have been retained will understandably view their job situation as essentially unaltered." *Fall River Dyeing Corp.*, 482 U.S. at 43. When examining the continuity of the employing enterprise, the Board will look at the objective factors, and how those influence the subjective attitude of the employees. *Straight Creek Mining, Inc.*, 323 NLRB 759, 763 (1997),

*enforced*, 164 F.3d 292 (6th Cir. 1998). Accord *Nephi Rubber Products Corp.*, 303 NLRB 151, 152 (1991) (stating that the "essential inquiry" is whether operations as they impinge on union members remain essentially the same after the transfer of ownership), *enforced*, 976 F.2d 1361 (10th Cir. 1992); *Sierra Realty Corp.*, 317 NLRB 832, 835 (1995) (explaining that the realty company maintenance employees would have perceived the successor employer as an entity which "simply displaced" the predecessor cleaning contractor employer and thus would have viewed their job situation as essentially unaltered), *enf. denied*, 82 F.3d 494 (D.C. Cir. 1996). The Board makes its "substantial continuity" determination based on the totality of the relevant circumstances. *See, e.g.*, *Fall River Dyeing*, 482 U.S. at 43. The Board has found *Burns* successor status notwithstanding the absence of any transfer of assets from the predecessor to the successor employer. *See Harter Tomato Products Co.*, 321 NLRB 901, 902 (1996) (lessee took over a segment of the lessor's business, operated it in the same manner, with the same equipment, and the same employees, and selling to the same customers), *enforced*, 133 F.3d 934 (D.C. Cir. 1998). In *Harter Tomato Products Co.,* the Board noted that *Burns* successors are generally found in two categories of cases: (1) where the successor purchases all or part of the predecessor employer's business; and (2) where the successor succeeds the predecessor employer on a contract for the performance of services. *Id.* at 902. *See also National Metal Processing, Inc.,* 331 NLRB 866, 869-70 (2000) (successive personnel leasing contractors); *Merchants Home Delivery Service,* 230 NLRB 290, 294 (1977) (successive delivery service contractors), *enf. denied on other grounds*,

580 F.2d 966 (9th Cir. 1978). Regarding the second category, in *National Metal Processing*, the Board found that a personnel leasing firm that provided production and maintenance employees to National Metal Processing was a *Burns* successor to the predecessor personnel leasing firm, in view of the substantial continuity of the two contractors' enterprises and the continuity in the employee complement. *National Metal Processing*, 331 NLRB at 869-70. The successor leasing firm provided the same services to National Metal Processing, hired a majority of the predecessor firm's employees, and there was no change in those employees' jobs, the equipment used, or the method of production. The unit employees continuing to work in the plant "would 'understandably view their job situations as essentially unaltered.'" *Id.* at 870 (citation omitted).

Applying these principles here, the Administrative Law Judge should conclude that CityWide is a *Burns* successor to Nico that had an obligation to recognize and bargain with Local 175. First, at all relevant times, a majority of CityWide's workforce had been employees of predecessor Nico as members of Local 175. Based on CityWide's payroll records from pay period ending February 28, 2016, CityWide hired 14 out of 26 (54%) employees previously employed by Nico.[13] Therefore, the payroll records establish that CityWide at all relevant times employed former Nico employees as a majority of its workforce.

[13] During the next three pay periods CityWide also employed a majority of employees previously employed by Nico; The pay period ending March 6, 2016, CityWide employed 15 out of 28 (54%) paving employees previously worked for Nico.; on the pay period ending March 13, 2016, CityWide employed 19 out of 33 (58%) paving employees previously worked for Nico; on the pay period ending March 20, 2016, CityWide hired 19 out of 3o2 (59%) paving employees previously worked for Nico. See Attached Appendix to CityWide Violated Section 8(a)(5) by Refusing to Recognize and Bargain with Local 175 as a Burns Successor.

Second, CityWide's operation is the same as Nico's. When the asphalt-paving workers reported to work for CityWide in late-February, they performed the same work they always had performed, under the same working conditions, for the same supervisors, in the same locations, and using the same equipment. From the employees' perspective, their work and working conditions remained unchanged. They were still performing paving work for Con Edison, Welsbach, and Verizon. Moreover, in Junior's February 12th speech to Nico's employees, Junior admitted that Nico formed CityWide so that it could sign a contract with Local 1010 and satisfy Con Edison's representation requirement, and advised the employees that they needed to join Local 1010 to continue performing the same work. In this context, the employees would "view their job situations as essentially unaltered." *Fall River Dyeing Corp.*, 482 U.S. at 43. Thus, the Administrative Law Judge should conclude that there was substantial continuity between CityWide and Nico.

Finally, a successor finding may be based on a successor replacing the predecessor employer on a contract for the performance of services. *Id, Harter Tomato Products Co.*, 321 NLRB 901. That is exactly what occurred here when CityWide began performing Nico's services under the terms of the Con Edison contract and the General Service Agreement.

Based on the preceding analysis, Administrative Law Judge should conclude that CityWide was a *Burns* successor that had an obligation to recognize and bargain with Local 175 as its employees' exclusive bargaining representative. By

refusing to do so since late February 2016, CityWide violated Section 8(a)(5). *See, e.g.*, *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1064 (2001).

### G. CityWide Violated Section 8(a)(2) by Recognizing Local 1010 When, as Nico's Alter Ego, It Already had a Bargaining Relationship with Local 175

The evidence establishes that CityWide is Nico's alter ego, and therefore it had to recognize Local 175 as the bargaining representative of CityWide employees. By not recognizing Local 175 and instead recognizing Local 1010, CityWide violated Section 8(a)(2). The applicable principles are that:

> [a]n employer that is under an agreement with an incumbent union may not simultaneously recognize another union as the representative of its employees. The incumbent union is the exclusive representative of the employees, and an employer's simultaneous recognition of another union unlawfully undermines the status of the incumbent union and unlawfully assists the status of the second union in violation of Section 8(a)(1) and (2) of the Act. This prohibition also applies to the alter ego of or single employer with the employer.

*Advance Architectural Metals, Inc.*, 351 NLRB 1208, 1217 (2007) (citing *CityWide Service Corp.*, 317 NLRB 861, 861 (1995) (alter ego); *Regional Import & Export Trucking Co.*, 292 NLRB 206 (1988), *enforced*, 914 F.2d 244 (3d Cir. 1990) (alter ego)).

As the evidence establishes, CityWide is Nico's alter ego. Nico had an established bargaining relationship with Local 175, and the parties' most recent collective-bargaining agreement was effective through June 30, 2017. Despite that bargaining relationship, CityWide entered a Section 8(f) agreement with Local 1010 in January 2016 and subsequently required the unit employees to become members of Local 1010 if they wanted to work. CityWide then signed a collective-bargaining agreement recognizing Local 1010 as the unit employees' Section 9(a)

representative in March 2016. In sum, CityWide's recognition of Local 1010 as the employees' exclusive bargaining representative while they continued to be represented by Local 175 violated Section 8(a)(2) and (1). *Id.*, 351 NLRB at 1217, and the cases cited therein.

The Administrative Law Judge should conclude that because CityWide is an alter ego of Nico, it violated Section 8(a)(2) by recognizing and entering into a contract with Local 1010 at a time when Local 175 remained the unit employees' exclusive bargaining representative.

### H. **Respondents' Affirmative Defenses Are Without Merit**

Respondents assert six (6) affirmative defenses. Three of these defenses should be summarily rejected. The Administrative Law Judge should reject Respondents' affirmative defenses that (1) the Complaint, in its entirety, alleged facts insufficient to constitute a valid cause of action[14]; (2) that the doctrine of equitable estoppel bars the Charging Party from relief in this case[15]; (3) that Local 175 is a labor organizing within the meaning of Section 2(5) of the Act[16], since these

---

[14] The Respondent failed to establish any support for this defense on the record. The facts set forth in the Complaint plainly establish a violation of Section 8(a)(1), (2) ,(5) and 8(d) of the Act. This argument is baseless.

[15] The equitable estoppel is not applicable. Here, even if in February 2016, it became clear to Nico that Local 175 was not able to join BCTC, and therefore its Con Edison contract was in peril, it could still have met its bargaining obligations by giving Local 175 notice and an opportunity to bargain over any possible subcontracting and move its business over to CityWide. Nico did not meet this obligation but rather chose to act unilaterally. By the time Nico actually informed Local 175 in the second week of February 2016 that it planned to form CityWide, move all of the bargaining unit's work to CityWide, and repudiated the collective bargaining agreement the changes were a *fait accompli*.

[16] Respondents readily admitted to having engaged in regular discussions and negotiations with representatives of Local 175 as it its employees bargaining representative.

three defenses have no basis in Board law and are unsupported by evidence in the record.

The most significant of the defenses, that the Charge is time barred under Section 10(b), is specifically addressed below. For the reasons stated in this section, none of those six defenses absolve either Nico or CityWide from liability for the unfair labor practices alleged in the Complaint and proven by the record evidence.[17]

### *1. The instant charge is not time barred under Section 10(b) of the Act*

After the start of the Hearing, Respondents amended their Answers to claim that the allegations in the Complaint are time barred under Section 10(b) of the Act. That defense should be rejected because the allegations in the current complaint are closely related to a timely filed charge and Respondent concealed material facts, therefore tolling the statutory period to file the charge to on or about October 6, 2016.

---

Section 2(5) of the Act defines "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 U.S.C.A. § 152.
Here, Senior admitted that in 2011 and then in 2014 he and Union representative Roland Bedwell participated in negotiating a labor contract which included grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. At the time that the original charge was filed, and at the time when the Complaint alleges Respondents' obligation began, Local 175 had not yet changed its affiliation. Similarly, record evidence establishes that the change in the affiliation occurred on November 2, 2017, while the alleged violations all occurred in 2015 and/or 2016 and therefore not affected by the change in affiliation.

[17] In addition to these six affirmative defenses, Respondent's also attempted to rely on the New York City Comptroller's Prevailing Wage Schedule, referred to as Local Law 220 as a reason why Nico or CityWide could not employ Local 175 members on asphalt paving projects. If the Respondent's present that as another defense, the Administrative Law Judge should reject that defense as well. Respondent did not present any other than Denegall's opinion as to what Local Law 220 was, and was contradicted by the fact that Respondent admitted that Local Law 220 was in effect for many years while Nico used Local 175 for asphalt paving work. [Tr. 473].

In *Redd-I, Inc.*, 290 NLRB 115 (1988), the Board set forth the factors to be considered in deciding whether complaint allegations are "closely related" to a timely filed charge. The "closely related" test comprised of the following factors:

(1) Whether the untimely allegations involve the same legal theory as the allegations in the timely charge.

(2) Whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the pending timely charge.

(3) Whether the respondent would raise the same or similar defenses to both allegations.

The Board applies the closely-related test even when the untimely allegation was first raised in a dismissed or withdrawn charge. *See Redd-I, Inc.*, 290 NLRB at 1118.*See, e.g., Carney Hospital*, 350 NLRB 627, 628, 630 (2007) (modifying *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988)).

The current Complaint alleges, among other things, that Nico and CityWide violated Section 8(a)(5) by unilaterally subcontracting the Verizon and Welsbach work. The current alter ego allegation is "closely related" to a similar allegation in Case 29-CA-169943 (withdrawn on May 26, 2016), a timely-filed allegation, because it involves a similar legal theory under the same section of the Act, is part of the same chain of events ending the bargaining relationship with Local 175 and establishing one with Local 1010, and Nico/CityWide raised the same defense to both allegations, i.e., the terms of its service contract with Con Edison. Therefore, the current Complaint, based on the charge filed in October 20, 2016, is not time

barred because is closely related to the charge in Case 29-CA-169943, withdrawn on May 26, 2016, well within the statutory period.

Furthermore, the Section 10(b) period does not begin to run until "the aggrieved party knows or should know that his statutory rights have been violated." *See John Morrell & Co.*, 304 NLRB 896, 899 (1991), *review denied,* 998 F.2d 7 (D.C. Cir. 1993) (unpublished decision); *see also United Kiser Servs., LLC*, 355 NLRB 319, 319 (2010); *St. Barnabas Med. Ctr.*, 343 NLRB 1125, 1144 (2004). Notice of the violation must be "clear and unequivocal," but it can be actual or constructive. *Univ. Moving & Storage Co.*, 350 NLRB 6, 18 (2007) (citation omitted). A charging party has constructive knowledge of a violation when it is "on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred." *Amalgamated Transit Union Local 1433*, 335 NLRB 1263, 1263 n.2 (2001); *see also Vanguard Fire & Sec. Sys.*, 345 NLRB 1016, 1016 (2005), *enforced*, 468 F.3d 952 (6th Cir. 2006). Knowledge of the violation is imputed to the charging party when it "would have discovered the conduct in question had it exercised reasonable or due diligence." *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), *enforced sub nom. East Bay Auto. Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007); *see also CAB Assocs.*, 340 NLRB 1391, 1392 (2003) (same). At the same time, the party asserting a 10(b) defense has the burden of making this showing. *See, e.g., Strick Corp.*, 241 NLRB 210, 210 n.1 (1979); *Crown Cork & Seal Co.*, 255 NLRB 14, 22 (1981). Moreover, a party may not rely on a 10(b) defense where: "deliberate concealment has occurred; material facts were the object of the concealment; and the injured party was

ignorant of those facts, without fault or want of due diligence on its part." *Morgan's Holiday Markets*, 333 NLRB 837, 838 (2001); *see also Brown & Sharpe Mfg. Co.,* 321 NLRB 924, 925 (1996), *enforced*, 130 F.3d 1083 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 926 (1998). The Board has clarified the "material facts" element by adopting a "standard of materiality" test wherein the concealed evidence must, "as an objective matter, make a critical difference in determining whether or not there was a reasonable cause to believe the Act was violated." *Morgan's Holiday Markets*, 333 NLRB at 840-41.

In the instant case, Local 175's attorney testified that the Union did not know that Nico continued to perform asphalt paving work until Nico disclosed this fact during settlement talks for Case 29-CA-174926 on or about October 6, 2016. In that conversation, Denegall admitted that Nico was still performing Verizon and Welsbach unit work through CityWide and that Nico and CityWide had signed a general service agreement. It is undisputed that Respondent failed to disclose the fact that it was performing unit work for Verizon and Welsbach and other contractors and that Nico and CityWide had signed a general service agreement. The unfair labor practice charge was filed on October 20, 2016. That date is obviously well within the 10(b) period.

Moreover, there is no evidence that Local 175 can be charged with constructive knowledge of CityWide's performance of this unit work, especially where Nico/CityWide consistently justified its refusal to recognize and bargain with Local 175 by focusing only on the Con Edison work and noting that Local 175 could

not become a member organization of the BCTC. That amounted to deliberate concealment of material facts.

Thus, because Nico/CityWide failed to disclose to the Union that it continued to perform the Verizon and Welsbach work, the 10(b) period for the allegations in the Complaint must be tolled until on or about October 6, 2016, when Nico disclosed that it was still servicing contracts from Verizon and Welsbach and that it had a general service agreement with CityWide. [18]

In addition, there is compelling evidence in the record supporting a finding that the Employer's own attorney deliberately concealed material facts from the Union and the Region. Specifically, Union Attorney Eric Chaikin testified without rebuttal from Respondents that until October 2016, Nico had informed Local 175 that it was out of business. [Tr. 436]. Additionally, in its April 4, 2016 letter from its attorney to the Region Respondents stated, untruthfully, that "Nico and CityWide are separate corporate entities." [GC Exh. 38(a),(b)].

As such, the Complaint in this case is not time barred under Section 10(b) of the Act and Respondent's defense should be rejected.

### *2. The collective bargaining agreement entered into between NYICA and Local 175 effective from 2014 to 2017 is valid as to both Respondents*

Respondents also assert, without any supporting evidence, that the Local 175 collective bargaining agreement is invalid. The collective bargaining agreement

---

[18] The fact that unit employees may have been working on Verizon or Welsbach jobs does not change the outcome. Notice to employees does not constitute notice to Local 175. *See A & P Brush Mfg. Corp.*, 323 NLRB 303, 309 (1997) (citing *Fire Tech Systems*, 319 NLRB 302, 305 (1995)), *enfd. in relevant part,* 140 F.3d 216 (2d Cir, 1998).

entered into between NYICA and Local 175 effective from July 1, 2014 and June 30, 2017, in the record as GC Exh. 9, is valid as to both Nico and its alter ego CityWide.

Once an employer has voluntarily adopted a contract, it is foreclosed under *John Deklewa & Sons* from repudiating it during its term 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 77 0 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). *Cab Associates*, 340 NLRB 1391, 1401-1402 (2003) (adoption by conduct when employer complied with virtually all contract terms, employed union stewards at projects, deducted and remitted union dues, and made full payment to union pension and welfare funds); *Marquis Elevator Co.*, 217 NLRB 461, 465-466 (1975) (adoption by conduct when employer adhered to terms of bargaining agreement, acquiesced in penalties imposed by the union for performance of unit work by supervisors, made monthly contributions to union funds, and used exclusive union hiring hall); *Vin James Plastering Co.*, 226 NLRB 125 (1976) (adoption by conduct when employer adhered to terms of bargaining agreement, including payments to various benefit funds, and deducted and remitted union dues).

Respondent Nico admitted, and the documentary evidence clearly shows that Nico adopted the 2014-2017 Local 175 collective bargaining agreement between the Union and NYICA by regularly applying the contract to its asphalt paving employees. [GC Exh. 27]. Respondents even made it a point to introduce records of an audit conducted by an accounting firm to establish that Nico had made appropriate contributions to the Local 175 funds[ R Exh.3]. Senior admitted to

having participated in negotiating the contract and later adopting the contract by paying the wages, and benefits. [Tr. 100, 102]. Therefore, Nico was clearly bound by the 2014-2017 contract between NYICA and Local 175.

Similarly, if an employer is found to be an alter ego of another employer that has a contract with a union, the alter ego is also bound by that union contract. *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 8 (2007). As the evidence clearly establishes that CityWide is Nico's alter ego therefore bound by 2014-2017 contract. Because the 2014-2017 contract is therefore valid and enforceable as to both Respondents' this defense should be rejected as well.

### *3. Charging Party's alleged and unproven conduct does not establish "unclean hands" that would estop any right of relief*

Respondents also assert, without providing any probative evidence, that Local 175 members engaged in violence that would estop the Union from any right of relief. That is simply incorrect. First, under no circumstance does a charging party's unlawful conduct excuse a charged party's unfair labor practice. See, e.g., *NLRB v. Plumbers Union of Nassau County Local 45*, 299 F.2d 497, 501 (2d Cir. 1962) ("one illegality should not excuse another. The public interest lies in labor peace, endangered by both."); *California Gas Transport, Inc.*, 347 NLRB 1314, 1326 fn. 36 (2006) ("the 'unclean hands' doctrine of equity does not operate against a charging party, because Board proceedings are not for the vindication of private rights, but are brought in the public interest and to effectuate the statutory policy"); *Teamsters Local 294 (Island Duck Lumber)*, 145 NLRB 484, 492 fn. 9 (1963) (one

union's conduct which potentially violates the Act does not excuse another union's unfair labor practice). Applying the principles above to the facts in this case leads to one conclusion; the unclean hands doctrine does not estop any right of relief here. Second, the Respondents did not present any credible evidence demonstrating that violence occurred. In support of its allegation, Respondent relies on one conclusory statement from Senior [Tr.249], which was credibly rebutted by Union President Seminatore [Tr. 289].

Therefore, Respondent's affirmative defense should be wholly rejected.

## IV. CONCLUSION

Based on the foregoing, and the record as a whole, General Counsel submits that the weight of the credible evidence and the documentary evidence establishes that Respondent violated Section 8(a)(1),(2),(5) and 8(d) of the Act in all respect at alleged in the Complaint.

Accordingly, it is respectfully request that Your Honor find the violations as alleged in the Complaint, and award all other relief as may be just and proper to remedy the unfair labor practices alleged.

Dated: February 2, 2018

Francisco Guzmán
Counsel for the General Counsel
National Labor Relations Board
Region 29
Two MetroTech Center
Suite 5100
Brooklyn, NY 11201-3838
Telephone: (718) 765-6198
E-mail: francisco.guzman@nlrb.gov

## Appendix to Section F. CityWide Violated Section 8(a)(5) by Refusing to Recognize and Bargain with Local 175 as a Burns Successor

| Employee name | | Nico Payroll Pay Period [GC 27] | | | | CityWide Payroll Pay Period ending [GC 28] | | | |
|---|---|---|---|---|---|---|---|---|---|
| Last | First | 01/18/16- 01/31/16 | 02/01/16- 02/07/16 | 02/08/16-02/14/16 | 02/15/16-02/21/16 | 2/28/2016 | 3/6/2016 | 3/13/2016 | 3/20/2016 |
| Borja | Luis | | | | | x | x | x | x |
| Borova | Lulzim | | | | | x | x | x | x |
| **Cando** | **Lenin** | | **x** | **x** | **x** | **x** | **x** | **x** | **x** |
| **Cando** | **Jhans** | | | **x** | **x** | **x** | **x** | **x** | **x** |
| Cando | Carlos | | | | | x | x | x | x |
| **Diar** | **Xhakil** | **x** | | **x** | **x** | **x** | **x** | **x** | **x** |
| **Fogarlie** | **Michael Anthony** | | | | **x** | **x** | **x** | **x** | **x** |
| **Golabek** | **Robert** | | **x** | **x** | **x** | **x** | **x** | **x** | **x** |
| Graham | Derrick | | | | | x | x | x | x |
| **Harris** | **Anthony** | **x** | **x** | **x** | **x** | **x** | **x** | **x** | **x** |
| **Jones** | **Lester** | **x** | **x** | **x** | **x** | **x** | **x** | **x** | **x** |
| Jones | Delroy Withmore | | | | | x | x | x | x |
| Lamicema | Giusseppe | | | | | x | x | x | x |
| Nutley | Charles | | | | | x | x | x | x |
| **Pasculo** | **Anthony** | | **x** | **x** | **x** | **x** | **x** | **x** | **x** |
| Polo | Ricardo | | | | | x | x | x | x |
| **Rossetti** | **Michael** | **x** | **x** | | | **x** | **x** | **x** | **x** |
| **Ruiz** | **Christopher** | **x** | **x** | **x** | **x** | **x** | **x** | **x** | **x** |
| **Shaw** | **Slade** | **x** | **x** | **x** | **x** | **x** | **x** | **x** | **x** |
| **Tricarico** | **Andrew** | | **x** | | **x** | **x** | **x** | **x** | **x** |
| **Watters** | **Anthony** | **x** | **x** | **x** | **x** | **x** | **x** | **x** | **x** |
| Borja | Segundo | | | | | | x | x | x |
| **Haynes** | **Arthur** | | **x** | **x** | **x** | | **x** | **x** | **x** |
| **Samplice/Semplic** | **Paul** | **x** | | | | | **x** | **x** | **x** |
| **Appice** | **Matthew** | | **x** | | **x** | **x** | | **x** | **x** |
| Beltran | Jorge | | | | | x | | x | x |
| Barretto | Michael | | | | x | | | x | x |
| Feliz | Harrell | | | | | | | x | x |
| **Lovetro** | **Tommaso** | | **x** | **x** | **x** | | | **x** | **x** |
| **Oliver** | **Victor** | **x** | **x** | **x** | **x** | | | **x** | **x** |
| **Zarcone** | **Anthony** | | | **x** | **x** | | | **x** | **x** |
| Lovetro | Angelo | | x | | | | | | x |
| Melfi | John | | | | | x | x | x | x |
| Ruela | Dominick/Domingo | | | | | | x | x | |
| Andreani | Carlo | | | | | x | x | | |
| Restrepo | German | | | | x | x | x | | |
| Caramano | Joseph | | x | x | x | | | | |
| Cardenas | Kevin | | x | x | x | | | | |
| DeGeneste | Victor | x | x | x | x | | | | |
| Diaz | Edgardo | | | | x | | | | |
| Morsles | Christopher | | | | x | | | | |
| Ojede | Manuel | | | | x | | | | |
| Pecoraro | Salvatore | x | x | x | x | | | | |

| | | | | | |
|---|---|---|---|---|---|
| Rojas | Fred | x | x | | |
| Salah | Shuman | | | x | |
| Seminatore | Costantino | x | x | x | x |
| Wolfe | Frank | x | x | x | x |
| Zuniga | Gerhard | x | x | | x |